YAP KHIAM CONSTRUCTION & TRADING SDN. BHD.

v.

LI-FOONG HOUSING & DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-23-533-87]
11 JANUARY 1991

CIVIL PROCEDURE: *Counterclaim by defendant - Application by defendant to join third party - Counterclaim must be related to or connected with the original subject matter of the action - Whether ought to be a separate action - Prejudicial - Embarrassment - Delay - Issues effectually and completely settled - Bona fides - Rule of the High Court 1980, O. 15, rr. 3(1), 5(2), O. 20 r. 5.*

Pursuant to an agreement between Indra Setia, IS and the defendant, L, IS commenced carrying out construction works (the said agreement). IS subsequently assigned its rights under the agreement to the plaintiff Y (the said assignment). The said assignment was consented to and executed by all parties. As a result of L's termination of the said agreement, Y commenced proceedings against L for wrongful termination and alleged that L had breached the agreement by failing to pay the project architect's certificates of payment. Y claimed for the contractual sum (the said sum) or for a Mareva injunction to freeze L's assets amounting to the said sum.

In its defence, L said that the said assignment only assigned the rights, titles, benefits, and claims of IS to Y. In addition, L also counterclaimed for damages which IS would have been entitled to, alleging that as a result of Y's breaches, it had suffered loss and damage. The Senior Assistant Registrar, SAR, subsequently ordered L to pay the said sum into Court as a condition for leave to defend Y's claim. L's application for the variation of the SAR's order was allowed.

Subsequently, L applied to amend its defence on the basis that it had obtained judgment in default of appearance against IS in another Civil Suit (the other Suit) whereby IS (and 4 guarantors) were ordered to pay the judgment sum (the said judgment sum) to L. After a date for the trial between Y and L had been set down, L made the present application under O. 20 r. 5 of the Rule of the High Court 1980 and O. 15 r. 3(1) to stay these proceedings pending disposal of an application by IS and another 4 guarantors to set aside the said judgment sum and to amend its statement of defence and include a counterclaim against Y and IS and the 4 guarantors who are not parties to the present action of Y against L.

L's Counsel contended that as the said agreement was terminated, it had a good counterclaim against Y in this Suit and against IS in the other Suit . The allegation was that under the said assignment it was not clear as to whether Y or IS was liable to carry out the works specified in the said agreement.

Y's Counsel argued that O. 15 r. 3(1) only dealt with amendments and that this Order can only be relied upon only if a party was already named as a co-defendant and a counterclaim could then be made against him and not if he was a stranger to the action.

The Court allowed that part of L's application in relation to the counterclaim against Y and dismissed the rest. L's application for further argument in open Court was allowed.

Held:

[1] (a) It is clear from the wording of O. 15 r. 3(1) that one of the conditions which has to be satisfied before this Order is resorted to is that the counterclaim of the defendant must ask for relief relating to or connected with the subject matter of the plaintiff's claim;

(b) it is explicit in O. 15 r. 3(3) that this Rule is subject to r. 2 which relates to the disposal of a counterclaim in a separate action.

[2] It is clear from the two preambles in the said assignment that only part of the works under the said agreement was assigned to Y - IS had already constructed and said to have completed the other part of the works. Further it is clear that in the other Suit L was also suing IS for purported defective works carried out by IS and Y in the present action.

[3] L's claims in the Suit against IS in the other Suit were not matters relating to or connected with the original subject matter of the action of the present plaintiff Y. L cannot attempt to extend the original subject matter of the present action with a matter with which Y is not concerned. To allow such an extension, evidence might well be adduced by L which would prejudice Y's action.

[4] L had already obtained judgment against IS and has therefore been completely compensated for whatever damages suffered. Therefore it cannot be said that L has a counterclaim against IS in this action; if L had any claim against IS in respect of the same subject matter in the present action, it should bring in IS as third party instead of filing the other Suit.

[5] To allow L to bring in these four guarantors as parties to the present action would be prejudicial to Y - apart from causing embarrassment, it would delay the trial of the present action and is otherwise inconvenient.

[6] There is no necessity that IS and the other four guarantors be joined before the issue in the present case can be effectually and completely settled.

[7] Y's claim in this action is in respect of works done by it under the said assignment and it is for Y to prove his case and there is no need for the interference of IS or anybody else.

[8] If L has a claim against IS and the 4 guarantors which is doubtful, it could have achieved what it intended to achieve by joining IS and the 4 guarantors as 1st to 5th and third parties without filing the other Suit.

[9] The Court questioned the *bona fide* of L in making its application to amend its statement of defence at this late stage. In making the application only after it had obtained judgment in default of defence in the other Suit, L was trying to argument its defence by using that judgment to embarrass and delay the trial of the present action; the judgment in default will also no doubt be prejudicial to Y's case.

[10] The Court's earlier order allowing the counterclaim was reversed because as it stands, the counterclaim is vague and inexplicit.

[Order accordingly.]

Cases referred to:

Amon v. Raphael Tuck & Sons Ltd.[1956] 1 QB 357
Barber v. Blaiberg [1881-82] Vol xix Ch D 473
The Germanic [1896] Probate Div 84

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 3(1), r. 5(2), O. 16

For the plaintiff - Lyold Fernando; M/s. Lyold Fernando & Co.
For the defendant - Vincent Lim; M/s. Vincent Lim & Teoh

JUDGMENT

Lim Beng Choon J:

This is an appeal made by the defendant by way of summons-in-Chambers (encl. 65A) on 11 January 1989 for an order that:

(a) the proceedings herein be stayed pending the disposal of an application by Indra Setia Construction Sdn. Bhd. and another four guarantors in Civil Suit No. S6-23-335-88 to set aside judgment in default obtained by the defendant herein against the said Indra Setia Construction Sdn. Bhd. and the said four other guarantors;

(b) further and/or in the alternative the defendant (herein) be given liberty to further amend the defence and include a counterclaim against the plaintiff herein and the said Indra Setia Construction Sdn. Bhd. and the said four other guarantors;

(c) costs of the application be costs in the cause.

In order to understand why the defendant should deem it fit to make this application it is useful to give a brief account of the history of the present case.

On 19 November 1987 the plaintiff instituted the present writ action against the defendant. The writ was accompanied by the plaintiff's statement of claim. For purposes of this interlocutory proceeding I need only set out the relevant averments thereof in the form of a brief narration. The plaintiff was a construction company and the defendant was a company whose business was housing development. The defendant (as employer/owner) had entered into an agreement with Indra Setia Construction Sdn. Bhd. (hereinafter referred to as "Indra Setia") on 12 March 1986 for the construction of a proposed housing development known as Taman Seri Cheras (Phase One) comprising of 367 housing units for the sum of RM12,920,493.44 only. Possession of site was given to Indra Setia on 26 March 1986 and the date of completion was 24 March 1987 for the priority units (not stated) and 12 weeks thereafter for the non-priority units (not clearly indicated) subject nevertheless to the provisions for extension of time contained in the agreement. However on 8 January 1987 Indra Setia assigned the agreement of 12 March 1986 to the plaintiff. The deed of assignment and its full terms and conditions were made known and consented to by the defendant and all the three parties executed the same. In addition on 2 September Indra Setia drew up a power of attorney in favour of the plaintiff. By virtue of the said deed of assignment and the said power of attorney the plaintiff thus instituted the present action in its own name. It was alleged that apart from wrongfully terminating the plaintiff's agreement (which I take it to mean the agreement of 12 March 1986 assigned to the plaintiff) causing the plaintiff to suffer loss and damage, the defendant had committed a breach of the said agreement by failing to honour the project architect's certificates of payment which were four in number totalling RM1,180,842.76. The works under the said agreement was practically completed to the extent of 99% when the defendant terminated the same. The plaintiff therefore claimed for the contractual sum (after deduction of payments made) totalling RM4,355,531.28 with interest at the rate of 8% p.a. The plaintiff also prayed that the defendant be ordered to pay the said sum into Court or alternatively an order which was tantamount to a mareva injunction to freeze all the assets of the defendant to the extent of RM4,355,531.28. On 20 November

the plaintiff applied by way of summons-in-chambers for an order to require the defendant to pay the monies claimed by it in its statement of claim into Court or alternatively a mareva injunction as prayed in its statement of claim. I need not labour on this application because upon hearing the application, this Court dismissed the application on 23 November 1987 (encl. 18). Thereafter the defendant filed its defence on 11 December 1987 (encl. 17) the relevant averments made therein amount to these: While the defendant admitted that it had entered into an agreement with Indra Setia on 12 March 1986 for the construction of the Taman Seri Cheras (Phase One) project comprising of 367 housing units for the sum of RM12,920,493.44 it denied it was answerable to the plaintiff for any liability as the deed of assignment approved by the defendant only assigned the rights, titles, benefits, interests, claim and advantage of the Indra Setia's agreement of 12 March 1986 to the plaintiff. It also averred that the date of completion of priority and non priority units of the project had been clearly indicated in the Indra Setia's agreement of 12 March 1986. The defendant also asserted that the said agreement of 12 March 1986 was lawfully terminated in view of several breaches on the part of the plaintiff in failing to construct and complete the buildings within the contractual date of completion or at all and failed to rectify defects on the completed buildings. The defendant also alleged that out of the four architect's certificates of payment it had fully settled one of the certificates of payment and it was entitled not to honour the other three certificates pursuant to the terms of the Indra Setia's agreement of 12 March 1986. It also categorically denied that the plaintiff had completed 99% of the works in the project. Under the circumstances the defendant claimed that it had the right to terminate the said agreement. As a result of the termination the defendant had to employ other persons to carry out and complete the project and thereby incurred extra expenses and suffered loss. In the premises the defendant, as it was entitled to, had set off its said loss, damage suffered and expenses incurred against all sums of monies that Indra Setia would otherwise had been entitled to (which the defendant would not admit) and in the circumstances the Indra Setia's agreement of 12 March 1986 and the plaintiff's claim in the present case was wholly extinguished. It is not clear from the Court's file whether the defendant had filled a Memorandum of Appearance as there is an unsigned certificate of non-appearance (encl. 15). I can only assume that either the defendant had not entered appearance or that the entry of the appearance was out of time before it filed its defence. I say this because on 10 February 1988 the defendant appealed to the Judge in chambers (encl. 19) against the order of the Senior Assistant Registrar (the SAR) directing the defendant to pay into Court the sum of RM953,186.55 within 60 days from 9 February 1988 (the date when the SAR made his decision) as a condition for leave to defend the plaintiff's claim. It appeared that the appeal was either never been heard or that the defendant withdrew the appeal and instead it applied by way of summons-in-chambers on 17 June 1988 (encl. 29) to vary the SAR's order by providing a bank guarantee instead of cash payment into Court. This application to vary the order of the SAR was approved by this Court and at the same time this Court directed an early trial of the case (encl. 46). Thereafter the plaintiff filed in its affidavit list of documents and supplementary list of documents. However on 30 November 1988 the defendant applied to amend its defence (encl. 56) by adding the following para. 22:

> The defendant avers that by another Suit *vide* Kuala Lumpur High Court Kod No. S6-23-355-88, the defendant had obtained judgment against the contractor (meaning Indra Setia) on 25 August 1988 in respect of the Contractor's breaches of the contract arising out of the Building Contract *inter alia* in the sum of RM2,493,127.71. (Words in parenthesis are mine).

Apparently the defendant had obtained judgment in default of appearance against Indra Setia in Suit S6-23-355-88 the 1st defendant in that Suit on 25 August 1988 and it was directed to pay the judgment sum of RM 2,493,127.71 together with interest to the plaintiff there who is

the defendant in the present case. The application was approved on 3 December 1988 and the amended statement of defence was duly filed on 4 December 1988 (encl. 62). Prior to that the action was set down for trial on 25 November 1988 (encl. 59).

On 11 January 1989 the defendant then made the present application encl. 65A. It is to be noted that the amendment sought by the defendant is not merely an amendment of its statement of defence but a substantial amendment of the statement of defence and inclusive of inserting a counterclaim not only against the plaintiff but also against Indra Setia and another four guarantors who are not parties to the present action of the plaintiff but they are defendants in Civil Suit S6-22(23)335-88 (hereinafter referred to as Suit 335) of which the defendant here is a plaintiff in Suit 335. At the hearing of the defendant's application encl. 65A on 15 July 1989 Counsel for the defendant submitted *inter alia* that the application was made pursuant to O. 20 r. 5 (amendment of writ or pleadings with leave) and also O. 15 r. 3(1) (counterclaim against additional parties) of the Rules of High Court 1980 (the RHC). Counsel also argued that an O. 15(3) application was an alternative to O. 16 proceedings (third party proceedings of the (RHC)). On his submission on the facts, Counsel said *inter alia* that the plaintiff's right to maintain the present action arose by virtue of the deed of assignment dated 8 January 1987 and on reading clause 2 with clause 4 of the said deed of assignment dated 8 January 1987 there appeared to be an inconsistency as to whether the plaintiff or Indra Setia was liable to carry out the agreement entered between the plaintiff and Indra Setia dated 12 March 1986. In Suit 335 the plaintiff there (who is the defendant here) was claiming against Indra Setia for failure to complete the works described in the 12 March 1986 agreement and as a consequence of which the said agreement was terminated. Although Counsel did not say so I assumed that what he meant was that as the 12 March 1986 agreement was terminated the defendant here had a good counterclaim against the plaintiff here and Indra Setia the 1st defendant in Suit 335. Therefore the case of the defendant here fell within the scope of O. 15 r. 3 of the RHC. Counsel for the plaintiff on the other hand contended (if I understood him correctly) that O. 15 r. 3 of the RHC did not deal with amendment; that order could be relied upon only if a party was already named as a co-defendant and a counterclaim could then be made against him and not if he was a stranger to the action. In any case leave was granted to the defendant to defend the case upon payment of nearly RM1million into Court. Furthermore the defendant had been told many times presumably by the solicitors of the plaintiff to take action to bring in Indra Setia as third party to the action but the defendant decided instead to sue Indra Setia by a separate action. Furthermore here the plaintiff was asking for payment in respect of works done by it pursuant to the agreement of 12 March 1986. The cause of action was based on the works carried out by the plaintiff and not Indra Setia. The cause of action in the present case was therefore different from the cause of action of the defendant as plaintiff in Suit 335. After hearing the submissions of Counsel I dismissed the application of the defendant but I allowed only that part of the counterclaim which directly involved only the plaintiff.

Upon the application of the defendant for further argument of the matter in open Court I allowed its application as I was of the opinion that the matter involved an important question of law which upon my investigation of local case law such matter had not been dealt with by our Courts and is *res integra*.

The further hearing took place on 6 September 1990. I do not propose to set out the submission of both Counsel not because they are of not much assistance to me but rather because I will be referring to the more pertinent parts of their submissions in the course of my deliberation.

It is appropriate at this juncture to set out the provisions of O. 15 r. 3(1) of the RHC which read:

> Where a defendant to an action who makes a counterclaim against the plaintiff alleges that any other person (whether or not a party to the action) is liable to him along with the plaintiff in respect of the **subject-matter of the counterclaim, or claim against such other person any relief relating to or connected with the original subject-matter of the action,** then, subject to r. 5(2), he may join that other person as a party against whom the counterclaim is made. (Emphasis is mine).

It is clear from the wordings of the said O. 15 r. 3(1) that one of the conditions to bring into play the said order is that the counterclaim of the defendant must ask for relief relating to or connected with the subject matter of the plaintiff's claim. This proposition finds support from the case of *Barber v. Blaiberg* [1881-82] Vol. xix Ch D 473. In this case the plaintiff Barber was grantee under a bill of sale executed by one, Bass, on 28 April 1880. On 1 June 1880 Bass executed the subsequent bill of sale to Blaiberg. In October 1880 Blaiberg or his agents removed from Bass's premises certain goods and chattels comprised in Barber's bill of sale. Thereupon Barber brought the action for detinue or damages. Then Blaiberg filed in a statement of defence and what was purported to be a counterclaim and he made Bass a party and asked against Barber and Bass, for a declaration that he was entitled to full relief under the bill of sale to him and, in alternative he asked, as against Bass alone, that Bass might be ordered to pay Blaiberg the amount still due under his bill of sale and interest and costs. In disallowing the counterclaim Fry J said at p. 477:

> The question, therefore, is whether the payment asked by Blaiberg from Bass is a matter "relating to or connected with the original cause or matter." The original subject of this cause is Barber's right to have the goods which Blaiberg has seized. The two matters are, in my judgment, totally distinct, and ought to be the subject of distinct litigation.

Reverting to the facts of this case, the cause of action of the plaintiff is hinged on the deed of assignment of 8 January 1987 by which Indra Setia assigned all its rights etc., to the plaintiff with the consent of the defendant. It is important to note that first of all under clause 17 of the agreement entered into between the defendant and Indra Setia, the latter was allowed to assign "the agreement or **any part thereof** or the obligation to carry out and the right to receive payment for any part of the works to be carried out under this contract or the right to receive the whole **or any part** of the contract sum with the prior written consent of the employer," that is to say the defendant. The second point to note is that the deed of assignment of 8 January 1987 made between Indra Setia as the assignor and the plaintiff as assignee, was unreservedly consented to by the defendant. The third point, which is very important to note is that in preamble (b) of the said deed of assignment it was stated:

> The assignor has partly performed its obligations in and under the Building Contract (meaning the 12 March agreement) required to be performed and has been fully paid for all monies due and payable on or before the date thereof. (Words in parenthesis are mine)

and in preamble (c) of the said deed of assignment it was stated:

> The assignor is desirous of assigning and the assignee is desirous of taking an assignment of all the rights and titles benefits interests **existing as of the date hereof** in and under the Building Contract at a consideration and upon the terms and conditions hereinafter contained. (Emphasis is mine).

It is clear from the two preambles in the deed of assignment of 8 January 1987 that only part of the works under the 12 March 1986 agreement was assigned to the plaintiff; Indra Setia has already constructed and said to have completed the other part of the works. This Court

has not been informed of the extent of the works carried out by Indra Setia before the assignment nor the extent of the works carried out by the plaintiff by reason of the assignment. In this connection it is relevant to observe that in Suit 335 the plaintiff there (the defendant in the present action) alleged *inter alia* that Indra Setia "In breach of the Building Contract, the 1st defendant (meaning Indra Setia) did not carry out the said Development in accordance with the contract drawing and specifications. In respect of this allegation particulars of the said breach were set out in three folios annexed to the statement of claim. A cursory glance at the three folios will show that practically all the houses contracted to be construed under the 12 March 1986 agreement were said to have been constructed not in accordance with the contract drawings and/or not in accordance with specifications. This indicates that in Suit 335 the plaintiff there sued Indra Setia not only for purported defective works carried by the company but also purported defective works carried by the plaintiff in the present action.

Pausing here for a moment to revert to the law, it is explicit in O. 15 of the RHC that although r. 3(1) thereof allows counterclaim against any other person along with the plaintiff, that Rule is subject to r. 5(2) of O. 15 which reads:

> 2. If it appears on the application of any part against whom a counterclaim is made that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient.

In the present action the plaintiff has opposed the application of the defendant and has filed an affidavit affirmed by its Accountant on 11 January 1989 (encl. 67) in which it was stated *inter alia* that the disputes in Suit 335 were not the same as the disputes in the present action. Furthermore the claims of the plaintiff in Suit 335 were different from the claims made by the plaintiff in the present action. It therefore prayed that the present action which was before Suit 335 was filed was heard first and that the latter Suit be stayed.

Reverting to the points I raised earlier. I am satisfied that there is sufficient ground for me to disallow the application of the defendant to stay the proceeding of the present action and/or to amend its defence to include a counterclaim against the plaintiff herein and Indra Setia pursuant to O. 15 r. 5(2) of the RHC and I say so for these reasons. In the first place in Suit 335 the plaintiff there sued Indra Setia not only for breaches of 12 March 1986 agreement relating to the works carried by the company but also the works carried by the plaintiff in the present action. That being the case the question, therefore, is whether the claims of the plaintiff in that Suit against Indra Setia are a matter "relating to or connected with the original subject matter of the action" of the present plaintiff. The answer is an obvious no. What the defendant is attempting to do is to extend the original subject matter of the present action with matter with which the present plaintiff is not concerned. Such an extension is clearly prejudicial to the plaintiff's action. To allow such an extension evidence might well be adduced by the defendant which would prejudice the plaintiff's action.

In the second place the defendant, as plaintiff in Suit 335 has already obtained judgment in default of defence the defendant there and has been fully compensated for whatever damages suffered by it. It is therefore idle to say that the defendant here has a counterclaim against Indra Setia; counterclaim judgment in Suit 335 with full compensation. It is then said that an appeal has been lodged by Indra Setia and if the appeal should succeed "there will be two suits pertaining to the same subject matter." The short answer to this contention is that I am not, as I have indicated earlier, convinced that the subject matter in the present action is the same as the subject matter in Suit 335. Furthermore the present action was instituted on

20 November 1987 and had the defendant any claim against Indra Setia in respect of the same subject matter in the present action it should bring in Indra Setia as third party instead of filing Suit 335 on 16 June 1988.

In the third place in Suit 335 Indra Setia was sued together with four other defendants who were said to be guarantors who by a guarantee and indemnity dated 27 March 1986, had jointly and severally undertaken to indemnify the plaintiff against all losses expenses and damages incurred or suffered by the plaintiff there in consequence of any failure on the part of Indra Setia to perform any of its obligations under the 12 March 1986 agreement. In allowing the defendant to bring in these four guarantors as parties to the present action by counterclaim will again be prejudicial to the plaintiff as well as causing embarrassment and delay the trial of the present action or is otherwise inconvenient. I do not think I can countenance such a situation. If an authority is called for I would refer to the case of *The Germanic* [1896] Probate Division 84. In that case, when the plaintiffs originally instituted their Suit , they brought their action only against the ship and the owners of the ship and those interested in it. It was after they had brought the action that they applied for leave to add somebody else that was the pilot as a party. In rejecting the application Lord Esher M.R. said at p. 89:

> One view of what he was asked to do would very probably lead to great inconvenience; the other view that he could take would lead to no real inconvenience. It seems to me, therefore, that the proper exercise of his discretion was not to run the risk of possible great inconvenience, but to leave the case as it was, so that there would be no inconvenience at all.

Finally the application of the defendant is in the nature of consolidation of Suit 335 with the present action. The only reason which makes it necessary to make a person a party to an action is illustrated in the following observation of Darlin J in *Amon v. Raphael Tuck & Sons Ltd.* [1956] 1 QB. 357 at 380:

> The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The Court might often think it convenient or desirable that some of such persons should be heard so that the Court could be sure that it had found the complete answer, but no one would suggest that it is necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party.

In the present case there is no question that Indra Setia and the other four defendants in Suit 335 must be joined before the issues in the present action can effectually and completely settled. Here the plaintiff is merely claiming for payments in respect of works done by him pursuant to the deed of assignment. It is for him to prove that the assignment was lawfully and that he did carry out the works under the assignment in accordance with the drawings and specifications and well in time. That does not call Indra Setia or anybody to interfere. The only reason that the defendant wants Indra Setia and the other four defendants in Suit 335 to come in is to make a purported counterclaim against them. The defendant's excuse is that since clause 4 of the deed of assignment of 8 January 1987 provides that:

> Notwithstanding the above clauses this assignment shall not relieve the assignor in anyway from its responsibilities and liabilities under the said Building Contract nor nullify any guarantees undertaken by the assignor in the event that the assignee fails to perform.

The defendant could therefore make a counterclaim against Indra Setia along with the plaintiff and hence its application for amendments should be allowed. I do not agree for if the defendant has a claim against Indra Setia and the four guarantors which is doubtful it could have achieved what it intended to achieve by bringing in Indra Setia and the four guarantors as 1st, 2nd, 3rd, 4th and 5th and third parties in the first place without filing Suit 335. Furthermore I question the *bona fide* of the defendant in making its application to amend its statement of defence at this late stage. There is no doubt that in making the application only after it had obtained judgment in default of defence in Suit 335 the defendant is trying to augment its defence by using that judgment to embarrass and delay the trial of the present action. The judgment in default will also no doubt be prejudicial to the plaintiff's case.

For the above reasons the application of the defendant encl. 65A is dismissed with costs. I also agree with the Counsel for the plaintiff that the earlier order made by me in chambers allowing the counterclaim made by the defendant against the plaintiff only should be reversed simply because as it stands the counterclaim is vague and inexplicit. It is for the defendant to apply for leave to amend its statement of defence to add in a counterclaim against the plaintiff. Whether it can do so or not is a matter for debate at the proper time.

Also found at [1991] 2 CLJ 1623